

An Abridged View of the Gang Deterrence and Community Protection Act (H.R. 1279)

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The House passed H.R. 1279, the Gang Deterrence and Community Protection Act of 2005, on May 11, 2005. S. 155, the Gang Prevention and Effective Deterrence Act of 2005, addresses many of the same issues often to similar effect and occasionally in the same language found in H.R. 1279. H.R. 1279, among other things, would dramatically increase the criminal penalties that follow as a consequence of a conviction for violent crimes, including gang offenses. It would expand the instances where juveniles charged with federal crimes of violence could be tried as adults and would authorize the establishment of criminal street gang enforcement teams. This is an abridged version – without footnotes, citations or quotation marks – of CRS Report RL32946, *Gang Deterrence: A Legal Analysis of H.R. 1279 With References to S. 155*. Related reports include CRS Report RL32943, *Gang Prevention and Suppression Legislation in the 109th Congress: Side-By-Side Comparison of S. 155, H.R. 970 and H.R. 1279*.

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Section 101. Criminal Street Gangs: Section 101 of H.R. 1279 as passed by the House amends 18 U.S.C. 521. In its present form section 521 calls for a sentencing enhancement of not more than 10 years for anyone who is a criminal street gang offender. The bill would replace 18 U.S.C. 521 with a new, separate crime. It would reduce from 5 to 3 the number of gang members required for coverage under the section. It would outlaw attempts and threats to commit a street gang offense and would raise the penalty for conspiracy to commit such an offense. It would enlarge the section's predicate offense inventory, that is, the crimes that qualify as street gang crimes. It would add section 521 to the list of money laundering predicates. It would require criminal forfeiture of property derived from or used to facilitate the commission of a violation of the act. And it would establish increased maximum and mandatory minimum penalties for the misconduct it proscribes. Where section 521 in its present form makes criminal street gang offenses punishable by imprisonment for not *more* than 10 years, H.R. 1279 would make them punishable by imprisonment for life or any term years not *less* than 10 years (by not less than 20 years if the offense results in serious bodily injury; by not less than 30 years if the predicate offense is kidnapping, aggravated sexual assault, or maiming; and by death or imprisonment for life if death results). S. 155 would make any violation of its version of 18 U.S.C. 521 punishable by imprisonment for not more than 30 years (by imprisonment for any term of years or for life, if the predicate offense carries a life sentence). S. 155 would call for neither mandatory minimums nor the death penalty.

Section 102. Increased Travel Act Penalties: The Travel Act would outlaw interstate travel or the use of the mail or facilities of interstate or foreign commerce in order to distribute crime-generated proceeds, or to commit a crime of violence or otherwise operate in furtherance of illegal gambling, drug trafficking, or various other racketeering offenses. H.R. 1279 would increase Travel Act penalties so that a violation involving the distribution of racketeering proceeds or to promote racketeering activities is punishable by imprisonment for not less than 5 nor more than 20 years (up from not more than five years); a violation involving a crime of violence is punishable by imprisonment for not less than 10 nor more than 30 years (up from not more than 20 years) or, if death results by death or imprisonment for any term of years or for life (up from imprisonment for any term years or for life). It would establish the same penalties for conspiracy to violate any of these provisions (conspiracy is now punishable by imprisonment for not more than five years). S. 155 would increase the Travel Act's promotion and proceeds penalties to not more than 10 years and authorizes use of the death penalty where a violation results in death. It would also amend the Travel Act to prohibit interstate or foreign travel, or use of the mails or a facility of interstate or foreign commerce, for the purpose of obstructing justice; misconduct which it makes punishable by imprisonment for any term of years and, if death results, by death or imprisonment for any term of years or for life.

Section 103. Violent Crime Amendments: Federal law outlaws carjacking if the crime is committed with intent to cause death or serious bodily harm. Subsection 103(a) would make the offense punishable regardless of whether it is committed with such an intent. It would also increase the penalties for violations: imprisonment for more than 20 years (up from not more than 15 years); if the offense results in serious bodily injury, imprisonment for not less than 10 nor more than 30 years (up from not more than 25 years); and it makes conspiracies subject to the same punishment as the underlying offense (up from not more than five years). S. 155 would only eliminate the specific intent requirement.

Subsection 103(b) would amend 18 U.S.C. 924(h), which outlaws transfer of a firearm knowing it will be used in a crime of violence or of drug trafficking, to establish a five year mandatory minimum term of imprisonment and increases the maximum to imprisonment for not more than 20 years (up from not more than 10 years). S. 155 would simply add "possessed in furtherance of" language, so that as in the case of the H.R. 1279 amendments, the prosecution would not need

to show that the firearm was affirmatively used. It would add no jurisdictional element, it would establish no mandatory minimum, and it would allow the existing 10 year maximum term of imprisonment to stand as a sentencing alternative or supplement to a fine under title 18.

Subsection 103(c) would amend 18 U.S.C. 3582(d) to permit federal sentencing courts to restrict those with whom defendants convicted of racketeering, drug, and criminal street gang offenses may associate or communicate – including their attorneys – upon a showing of probable cause that the association or communication is for the purpose of directing or participating in a criminal enterprise. As subsection 3582(d) now stands it exempts attorneys from the order’s reach and does not include street gang offenses. S. 155 would permit the authority of subsection 3582(d) to be used for defendants convicted of criminal street gang violations, but keeps the attorney exception to the bar.

Subsection 103(d) would increase the penalty under 18 U.S.C. 371 for conspiracies to violate the laws of the United States or to defraud the United States from imprisonment for not more than five years to imprisonment for not more than 20 years. There are scores and perhaps hundreds of federal felonies, the majority of which carry a maximum term of imprisonment of less than 20 years. For these crimes, subsection 103(d) would mean that planning to commit them would be punished more severely than committing them. There is no comparable provision in S. 155.

Section 104. Murder and Other Violence for Hire: Increased Penalties for Use of Interstate Commerce: Federal law now condemns interstate travel or the use of the mails or any facility in interstate or foreign commerce in furtherance of the commission of a murder for hire. Section 104 would amend the law to include crimes of violence other than murder within the proscription and increases the sanctions for those violations that are not capital. S. 155 would adjust the general maximum term of imprisonment from not more than 10 years to not more than 20 years; the maximum in cases where bodily injury results from not more 20 years to not more than 30 years; and the maximum in cases where death results from death or life imprisonment to death, or imprisonment for life or any term of years.

Section 105. Violence in Aid of Racketeering: Penalty Increases: Federal law prohibits murder and other forms of violence committed on behalf of a racketeering enterprise, either for hire or when motivated by reasons of membership in the enterprise. The sentencing increases in section 105(a) for violence in aid of racketeering mirror those in section 104 for murder or violence for hire – imprisonment for life as a standard maximum sanction with escalating mandatory minimums often set at what had been the previous maximum sanction. H.R. 1279 would permit prosecution of a violation of 18 U.S.C. 1959 either in the district in which the crime of violence or in any of the districts in which a racketeering activity of the enterprise occurs. The Constitution might constrain the section’s reach here. S. 155 has no comparable venue feature and would establish no mandatory minimums, but it would impose an escalating series of increased sanctions.

Section 106. Violence Committed During and In Relation to Drug Trafficking: Section 106 of H.R. 1279 would create a new federal crime, 21 U.S.C. 865, which would prohibit the commission of (or attempt or conspiracy to commit) a crime of violence during and in relation to a drug trafficking offense. Violators would be subject to a series of penalties: if death results, by death or imprisonment for life; otherwise by imprisonment for life or any term of years (but not less than 10 years as a general rule; not less than 20 years in the case of an assault resulting in serious bodily injury; and not less than 30 years in the case of kidnaping, aggravated sexual assault, or maiming). S. 155 has a corresponding section which contains a venue subsection whose reach might be constitutionally constrained.

Section 107. Multiple Interstate Murder: Section 107 would make it a federal crime to travel in interstate or foreign commerce, or to use the mails or other facilities in interstate or foreign commerce, to commit two or more murders in violation of state or federal law – or to attempt or conspire to do so. The crime would be punishable by death or life imprisonment, if death results; by imprisonment for life or any term of years not less than 20, if serious bodily injury results; and by imprisonment for life or any term of years not less than 10, in all other instances. S. 155’s treatment differs in a number of respects. It would only apply if the defendant travels in interstate or foreign commerce. Although the offense would apply in the case of *one* or more murders, the defendant must either conspire to commit or actually commit the murder. It would not cover attempt. If death results, violations would be punishable by death or imprisonment for life *or for any term of years*; otherwise, conspiracy would be punishable by imprisonment for not more than 30 years for each murder plotted.

Section 108. RICO Predicates: Federal Racketeer Influenced and Corrupt Organizations (RICO) law prohibits using the patterned commission of certain crimes (called predicate offenses or racketeering activity) to acquire or conduct the activities of an enterprise whose activities affect interstate or foreign commerce. The underlying predicate offenses consist of (a) designated federal crimes and (b) various felonies under state law. These state crimes may provide the basis for a RICO prosecution anywhere in the United States where state law applies. State law does not apply without federal acquiescence, however, in any federal enclave within the state that is subject to the exclusive legislative jurisdiction of the United States, as are portions of certain Indian reservations. Section 108 would amend RICO so that these state crimes might serve as RICO predicates when they would have qualified but for the fact they were committed in Indian country or some other federal enclave subject to the exclusive legislative jurisdiction of the United States. It would also place the multiple interstate murder offense created in section 107, among the federal RICO predicates. S. 155 has no provisions similar to those of section 108.

Section 109. Bail for Firearms Offenses: Those arrested for the commission of federal crimes are entitled to release subject to those judicially determined conditions necessary to assure public safety and their subsequent appearance at judicial proceedings. In the case of crimes of violence and certain other serious crimes, the judicial officer must hold a hearing to determine, in light of statutory identified factors, whether any combination of conditions will assure public safety and appearance of the accused. In the case of serious drug trafficking and child abuse offenses, there is a rebuttable presumption that no conditions will provide the necessary assurances.

Among the statutory factors to be considered are “the nature and circumstances of the offense charged, including whether the offense is a crime of violence, or involves a narcotic drug.” Section 109 would enlarge this category so that it embodies “the nature and circumstances of the offense charged, including whether the offense is a crime of violence, or *involves a controlled substance, firearm, explosive, or destructive device.*” It would also expand the grounds for a rebuttable presumption of detention numbering among them the fact the person has been charged with a crime of violence or possession of a firearm by a member of certain disqualified classes. S. 155 differs in that it would afford the government the right to move for a detention hearing when the accused is charged with unlawful firearms possession under any section 922(g) disqualifications, but limits its firearm possession enlargement of the rebuttable presumption to cases of possession by a felon convicted of a drug offense carrying a 10 year maximum term of imprisonment.

Section 110. Venue in Capital Cases: Section 110 would replace the requirement in 18 U.S.C. 3235, that capital cases be tried in the county in which they occur if possible, with permission to prosecute capital cases (a) where they are committed, begun, continued or completed or (b) in cases involving importation or other activities that affect interstate or foreign commerce where

the activities occur. The Constitution may limit the amendment's reach. S. 155 has comparable provisions.

Section 111. Statute of Limitations for Crimes of Violence: Federal capital offenses may be tried at any time. Most other federal crimes must be prosecuted within five years. H.R. 1279 would establish a 15 year statute of limitations for noncapital crimes of violence. By virtue of the amended definition of crimes of violence, the new period of limitations also applies to drug trafficking. There may be some question whether the bill supersedes the longer statutes of limitation for crimes against children or for terrorism crimes involving an injury risk. S. 155 would establish a 10 year statute of limitations for crimes of violence (or eight years after the crime is discovered if longer). It begins with the enigmatic phrase, "[e]xcept as otherwise expressly provided by law." It is unclear whether this refers to the general five year statute of limitations provided by law; or to the specific periods for terrorism offenses, child abuse offenses, arson offenses and the like; or to all of them; or to none of them.

Section 112. Definition of Crime of Violence: Federal law contains several definitions of "crime of violence." The most commonly used is found in 18 U.S.C. 16. H.R. 1279 would add drug trafficking crimes to the definition of crimes of violence. S. 155 has no equivalent.

Section 113. Hearsay Exception for Wrongdoing: The Federal Rules of Evidence, which apply in both criminal and civil cases, make hearsay evidence inadmissible, but include an exception for any statement offered against a party that has *engaged or acquiesced in wrongdoing*, that was intended to, and did, procure the unavailability of the declarant as a witness. Section 113 would amend the exception for any statement offered against a party that has engaged or acquiesced in wrongdoing, *or who could reasonably foresee such wrongdoing would take place, if the wrongdoing was intended, and did, procure the unavailability of the declarant as a witness.* S. 155 would grant an exception for wrongdoing engaged in, acquiesced in or *conspired* for.

Section 114. Use of Firearms in Crimes of Violence: Section 114 would supplement the sanctions for use of a firearm during and in relation to crime of violence, so that the offense would be punishable by imprisonment for not less than seven years (up from not less than five years); if the firearm is discharged, by imprisonment for not less than 15 years (up from not less than 10 years); and if the firearm is used to injure another person, by imprisonment for not less than 20 years. S. 155, like H.R. 1279, would increase the general mandatory minimum for violations of 18 U.S.C. 924(c) from five to seven years; and would treat the conspiracy the same as the underlying violations. It would not increase the penalty for discharging a firearm or that for wounding a victim nor would it increase the penalty under the general conspiracy statute to not more than 20 years (leaving it at not more than five years).

Section 115. Federal Trial of Juveniles as Adults: Under existing federal law mandatory transfers of a juvenile for trial as an adult are only available for 16- and 17-year-old repeat offenders alleged to have committed a crime of violence or drug trafficking. Section 115 would eliminate the requirement that the juvenile be a repeat offender and would adjust the profile of the crimes that require transfer. S. 155 would preserve the mandatory transfer limitation to repeat offenders. Elsewhere, it would permit trial of 16- and 17-year-olds as adults in the case of a more selective collection of violent crimes, but would authorize a transfer back to juvenile proceedings in such cases.

Section 116. Law Enforcement Publicity Campaign: Section 116 would explicitly authorize the Attorney General to conduct a publicity campaign to highlight the increased penalties under H.R. 1279. S. 155 has no similar provisions.

Sections 117 and 119. Illegal Aliens in FBI Database: The Federal Bureau of Investigation's National Crime Information Center maintains a criminal records database. H.R. 1279 contains

two identical provisions, sections 117 and 119. They would instruct the Department of Homeland Security to provide the FBI with information on aliens who have overstayed their visas, been ordered removed from the U.S., or have agreed to leave the U.S. They would authorize the FBI to include information on immigration laws violations within the NCIC systems. S. 155 has no similar provisions.

Section 118. Crimes of Violence by Illegal Aliens: Section 118 would establish an additional mandatory minimum sentence of five years (15 years in the case of alien previously removed for criminal misconduct) for illegal aliens who commit, attempt to commit, or conspire to commit a crime of violence (as defined in section 16) or a drug trafficking offense (as defined in section 924). S. 155 has no similar provisions.

Section 120. Study of Any Nexus Between Illegal Aliens and Gangs: Section 120 would direct the Attorney General and the Secretary of Homeland Security to study and report on the connection between illegal immigration and gang membership and activity. S. 155 has no comparable provisions.

Section 201. High Intensity Interstate Gang Activity Areas: Section 201 would authorize the appropriation of \$60 million for each of the next five fiscal years to permit the formation of criminal street gang enforcement teams in high intensity interstate gang activity areas. It would authorize the appropriation of \$20 million for each of the next five fiscal years to allow the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE) to hire agents and inspectors to be assigned to high intensity interstate gang activity areas to ensure improved reporting of gang weapons use. And it would authorize appropriations of \$7.5 million to employ additional Assistant United States Attorneys to be assigned to high intensity interstate gang activity areas. The high intensity interstate gang activity areas would be designated by the Attorney General in consultation with local area officials and the governors of the appropriate states. The section would command the Attorney General to establish an FBI National Gang Intelligence Center to provide a clearinghouse through which federal, state, and local law enforcement officials can share gang activity information and analysis. He would also be directed to establish a regional gang activity databases for each of the high intensity interstate gang activity areas. S. 155 has a number of individual grant provisions of its own.

Section 202. Gang and Violent Offender Technology and Training: Section 202 would authorize appropriations of \$20 million for each of the next five years for prosecutorial and law enforcement training and technology to assist in the identification and prosecution of gang members and violent offenders. Section 113 of S. 155 is similar except that it would authorize \$12 million a year for the same purposes as well as to create and expand witness protection programs.

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